

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
EUGENE LUMLEY,	:	ECF
Individually and on Behalf of All Other Persons	:	08 CV 3993 (TPG) (AJP)
Similarly Situated,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
UNITED STATES TRUST COMPANY, N.A.,	:	
BANK OF AMERICA, N.A. and	:	
JOHN DOES #1-10, Jointly and Severally,	:	
	:	
Defendants.	:	
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SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made and entered into on this 23rd day of June, 2009, between the named Plaintiff Eugene Lumley (“Plaintiff”), and Defendant Bank of America, National Association (“Defendant”) (collectively, the “Parties”), subject to Court approval pursuant to Rule 23 of the Federal Rules of Civil Procedure and Section 216 of the Fair Labor Standards Act.

WHEREAS, *Eugene Lumley v. Bank of America, N.A., et al.*, Civil Action Number 08 CV 3933 (“Lawsuit”), is currently pending and unresolved in the Court;

WHEREAS, the Complaint alleges that Plaintiff and all persons similarly-situated are owed overtime pay at the rate of one-and-one-half times their regular wage rate

under both the federal Fair Labor Standards Act (“FLSA”) and the New York Labor Law (“NYLL”).

WHEREAS, the Parties, each represented by competent counsel, have held extensive arms-length discussions and negotiations, and have engaged in motion practice, and factual investigation including, without limitation, the review of relevant documents and legal and factual research;

WHEREAS, the Parties recognize that continued litigation of the Lawsuit will be costly, time-consuming and inconvenient, and desire to enter into this Agreement to avoid such costs, time and inconvenience as well as the inherent risks of litigation, and to obtain the benefits hereof, without admission of liability on the part of Defendant, which liability is expressly denied;

WHEREAS, the Parties, after considering the allegations of Plaintiff and the defenses available to or asserted by Defendant, have determined in good faith to settle the Lawsuit;

WHEREAS, the Parties have agreed to the preliminary certification, for purposes of settlement only, of the Class (as defined herein), subject to the entry of the Final Order and Judgment;

WHEREAS, Plaintiff’s Class Counsel has concluded that this Agreement, and the settlement embodied herein, is fair, reasonable and in the best interests of Plaintiff and the Class, and in evaluating the settlement have considered the expense and time necessary to prosecute the Lawsuit through trial, the defenses asserted by and available to Defendant, the

inherent risks of litigation, the uncertainty involved in the outcome of litigation of this nature, the fact that resolution of Plaintiff's and the Class' claims at the trial level could involve appellate review, and the substantial immediate cash benefit provided to Plaintiff and the Class by this Agreement;

WHEREAS, it is the purpose of this Agreement to resolve, settle and discharge, upon the terms and conditions set forth herein, all claims based upon, or which could be based upon or arise from, any of the matters alleged in the Complaint, and to bar Plaintiff and all Class Members from bringing, participating in or receiving any relief from any class or collective actions under the FLSA or NYLL; and

WHEREAS, while denying any wrongdoing of any kind, Defendant has agreed to enter into this Agreement to reduce further expense, time and inconvenience, and avoid the inherent risks of and the distraction of burdensome and protracted litigation, to obtain the orders and judgment contemplated by this Agreement, and to obtain the benefits of the Agreement,

NOW, THEREFORE, in consideration of the mutual covenants, agreements and promises contained herein, it is stipulated and agreed by and among Plaintiff and Defendant that the Lawsuit shall be resolved by the terms and conditions hereinafter set forth, upon approval of the Court.

ARTICLE 1
DEFINITIONS

The below-listed terms as used in this Agreement are defined as follows:

1.1 Claims. All direct or indirect causes of action, demands, liabilities, damages, whether in law or equity, statute or contract, suits, controversies and other legal or equitable claims of any kind or nature, which have not been previously settled or otherwise resolved or satisfied, including claims for attorneys' fees and costs, of any Class Member based upon, or which could be based upon or arise from, any of the matters alleged in the Complaint, (including all class or collective actions under the FLSA or NYLL).

1.2 Class. "Class" is defined as all employees employed by U.S. Trust and/or the Bank in New York, New York from April 29, 2002 to September 30, 2007, who held the officer title of First Level Officer ("FLO") in Tax Planning in the New York Office and who were classified as exempt from overtime and includes in its entirety the persons listed on Exhibit E.

1.3 Class Member. An individual member of the Class.

1.4 Class Period. April 29, 2002 through September 30, 2007.

1.5 Costs of Administration. The actual and direct costs reasonably charged by Plaintiff's Class Counsel, William C. Rand, Esq., who will act as the Settlement Administrator for his services in administering the Settlement, currently projected by the Parties not to exceed, in combination with the Fee and Expense Award, One Hundred and Fifty Thousand Dollars and No Cents (\$150,000.00).

1.6 Court. The United States District Court for the Southern District of New York.

1.7 Defendant. Bank of America, N.A. “Defendant” as used herein is the successor in interest to U.S. Trust because effective February 22, 2008, U.S. Trust merged with and into Bank of America, N.A. and thereafter ceased to exist as a legal entity. On May 30, 2008, the Court So Ordered a Stipulation dismissing Defendant United States Trust Company, N.A. from the above-entitled action without prejudice. This Stipulation and Settlement Agreement of Claims is, however, entered into on behalf of Bank of America, N.A. and U.S. Trust and all claims brought in this Action, including, but not limited to, those against U.S. Trust, are hereby settled.

1.8 Defendant’s Counsel. Aimee B. Florin, Esq. and Jill L. Rosenberg, Esq., Orrick, Herrington & Sutcliffe LLP, 666 Fifth Ave., New York, New York 10103.

1.9 Effective Date of Settlement. Provided that there are no objections to the Agreement by Class Members, the Effective Date of Settlement shall mean the first business day following the entry of the Order of Final Judgment in substantially the form attached hereto as Exhibit A. If there are any such objections, the Effective Date of Settlement shall be the first business day after (i) entry of the Order of Final Judgment and expiration of the time to file a notice of appeal, or, (ii) if a timely notice of appeal has been filed, the date upon which the appeal has been dismissed or the appeal has been finally adjudicated affirming the Order of Final Judgment, whichever is later.

1.10 Eligible Class Member. Any Class Member who has not properly and timely exercised opt-out rights in connection with the Lawsuit.

1.11 Fee and Expense Award. Such award of fees and expenses as the Court may authorize to be paid to Plaintiff's Class Counsel for the services they have rendered to the Plaintiff and the Class in the Action, not to exceed, in combination with the Costs of Administration, One Hundred and Fifty Thousand Dollars and No Cents (\$150,000.00).

1.12 Final Approval. The Settlement Order and Judgment has been entered and the Court has made its final order awarding attorneys' fees and expenses.

1.13 Final Approval Hearing. A hearing held before the Court to consider Final Approval of the Settlement including the attorneys' fees and expenses and Named Plaintiff Award set forth herein, and the merits of any objections to the Settlement Agreement or any of the terms of the Settlement Agreement .

1.14 Gross Fund Value. The total of Six-Hundred and Sixty-One Thousand, Three Hundred and Ninety-Two Dollars and Seventy-Nine Cents (\$661,392.79) which is the maximum amount Defendant shall be required to pay under this Settlement.

1.15 Named Plaintiff Award. Such award as the Court may authorize to be paid to the Plaintiff Eugene Lumley, in recognition of his efforts in obtaining the benefits of the Settlement for the Class and in exchange for a full release of claims against Defendant. Defendant has agreed not to object to any request for a Named Plaintiff Award in an amount not to exceed Ten Thousand Dollars and No Cents (\$10,000.00).

1.16 Net Fund Value. The Gross Fund Value, less all of the following: the Fee and Expense Award and the Named Plaintiff Award. The Net Fund Value, when added to

the Fee and Expense Award and the Named Plaintiff Award shall not exceed the Gross Fund Value.

1.17 Notice Date. The Notice Date shall mean the date that the Settlement Notice to the Class Members is mailed.

1.18 Objection Deadline. Sixty (60) calendar days after the Notice Date.

1.19 Opt-In Plaintiff. A Class Member who has timely exercised his or her right under Section 16 of the FLSA, 29 U.S.C. section 216(b), to opt-in by endorsing the Settlement Payment check.

1.20 Opt Out Submission. A written statement submitted by a Class Member and received by the Settlement Administrator wherein the Class Member requests to be excluded from the Settlement Class.

1.21 Order of Final Judgment. The Order of Final Judgment substantially in the form attached as Exhibit A hereto.

1.22 Plaintiff. Eugene Lumley.

1.23 Plaintiff's Class Counsel. William C. Rand, Law Office of William Coudert Rand, 711 Third Avenue, Suite 1505, New York, New York 10017, and Jeffrey M. Gottlieb, Berger & Gottlieb, 150 East 18th Street, Suite PHR, New York, New York 10003.

1.24 Preliminary Order Approving Settlement. An order of the Court substantially in the form attached hereto as Exhibit B.

1.25 Released Claims. All claims, demands, rights, liabilities, and causes of action that were or might have been asserted (whether in tort, contract, or otherwise) for

violation of any state or federal law, whether for economic damages, noneconomic damages, restitution, penalties, liquidated damages, punitive damages, interest or other monies arising out of, relating to, or in connection with any facts, transactions, events, policies, occurrences, acts, disclosures, statements, omissions or failures to act, which are or could be the basis of claims that the Released Parties (as defined below) failed to pay any overtime wages to which Class Members were entitled, improperly classified Class Members as exempt, failed to keep records properly concerning time worked, failed to properly pay any wages, at any times on or before Final Approval, provided that only those Class Members who endorse their Settlement Payment checks shall be deemed to release any claims that they possess arising under 29 U.S.C. 201 et. seq., the Fair Labor Standards Act and only those Class Members who do not affirmatively opt-out of this Action shall be deemed to release any claims that they possess arising under the New York Labor Law.

1.26 Released Parties. Defendant and any of its parents, subsidiaries, affiliated entities, predecessors, successors and assigns, and any current or former officers, board members, directors, shareholders, employees, administrators, trustees, executors, attorneys, consultants, legal representatives, agents and insurers, or any plan, plan fiduciary or plan administrator, creditors and any otherwise affiliated or related entities or persons including, but not limited to, U.S. Trust.

1.27 Rule 23 Plaintiffs. Class Members who do not validly and timely elect to opt-out of this case by submitting an Opt Out Submission by the Objection Deadline.

1.28 Settlement Administrator. William C. Rand, Esq. or such other entity which the Parties mutually agree shall serve as Settlement Administrator.

1.29 Settlement Class Members (or “Settlement Class”). Plaintiff, all Opt-In Plaintiffs and all Rule 23 Plaintiffs.

1.30 Settlement Hearing Date. The date set by the Court for the hearing on the fairness of this Agreement and on any objections to this Agreement.

1.31 Settlement Notice. The Settlement Notice substantially in the form attached hereto as Exhibit C.

1.32 Settlement Payment. The gross amount (including any taxes or other standard withholdings that shall be deducted) that each Eligible Class Member is entitled to receive of the Net Fund Value.

1.33 Stipulation or Agreement. This Joint Stipulation and Settlement Agreement of Claims.

1.34 Unknown Claims. Any and all actions, suits, claims, demands, rights, liabilities or causes of action other than those specified in paragraph 1.24 above that the Parties, or any of the Class Members do not know of or suspect to exist in their favor, which, if known by them, might have affected their agreement to the Settlement. With respect to Unknown Claims, as of Final Approval, each of the Settlement Class Members hereby expressly waive and relinquish, to the fullest extent permitted by law, all such Unknown Claims.

1.35 Workweek. The seven-day period beginning at 12:01 a.m. on a Monday and ending at midnight on the following Sunday, in which a Class Member performed work for Defendant.

ARTICLE 2
STIPULATION FOR CLASS CERTIFICATION

2.1 For settlement purposes only, the Parties stipulate to, and request that the Court certify the following classes: (a) the Opt-In Plaintiffs as an FLSA Collective Class and FRCP Rule 23 class and (b) the Rule 23 Plaintiffs as an FRCP Rule 23 class, only (collectively the “Class”). Should, for whatever reason, the Settlement not become final, the Parties’ stipulation to collective action and class certification as part of the Settlement shall become null and void *ab initio* and shall have no bearing on, and shall not be admissible in connection with, the issue of whether or not certification would be appropriate in a non-settlement context. Defendant expressly reserves its right and declares that it intends to oppose collective action and class certification vigorously should this Settlement not become final.

ARTICLE 3
SETTLEMENT AND RELEASE

In compromise and settlement of the Claims of Plaintiff and the Class against Defendant, the Parties agree that the WHEREAS clauses above form part of the basis of this Agreement and are incorporated herein as covenants by this reference and further agree as follows:

3.1 **Exhibits:** Exhibits A through E, inclusive, attached hereto and referred to herein are incorporated as part of this Agreement.

3.2 **Opt-Outs:** This Agreement shall not be binding on or affect the rights of any Class Members who timely exercise his or her right to opt-out from the Class. Those persons shall be listed on Exhibit 1 to the Order of Final Judgment.

3.3 **Release of Claims.** Plaintiff and all Settlement Class Members stipulate and agree that, upon the Effective Date, they shall be deemed to have, and by operation of the Settlement Order and Judgment shall have, expressly waived and relinquished the Released Claims and Unknown Claims. Even if the Plaintiff and/or the Settlement Class Members may hereafter discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, each Plaintiff and Settlement Class Member, upon the Effective Date, shall be deemed to have and by operation of the Final Judgment shall have, fully, finally, and forever settled and released any and all of the Released Claims and Unknown Claims. This is true whether the Released Claims are known or unknown, suspected or unsuspected, contingent or noncontingent, whether or not concealed or hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law, or rule, without regard to the subsequent discovery or existence of such different or additional facts.

3.4 **Covenant Not to Sue.** The Settlement Class Members agree not to sue or otherwise make a claim against any of the Released Parties that is in any way related to,

arises out of, or is connected with the Released Claims. The Settlement Payments and the Named Plaintiff Award shall be paid to Settlement Class Members specifically in exchange for the release of the Released Parties from the Released Claims and for the covenant not to sue concerning the Released Claims.

3.5 Settlement Payments. Settlement Payments shall be made from the Net Fund Value. Defendant shall pay to the Eligible Class Members the amounts listed on Exhibit E. Exhibit E lists amounts due to each Class Member if they elect to participate in the settlement. It shows each Class Member's weeks worked in Tax Planning in the New York, New York Office while holding the officer title of FLO from April 29, 2002 to September 30, 2007 times 4.52 hours (the assumed number of overtime hours worked by each Class Member during each week for the purpose of this settlement only) times one and one half times the Class Member's average hourly rate, plus interest and an additional 15% as liquidated damages. Settlement Payments are defined as the payments listed on Exhibited E plus the attorneys' fees, costs and expenses and Named Plaintiff Award as listed below.

3.6 Attorneys' Fees, Litigation Costs and Expenses. Within thirty (30) calendar days of the Effective Date of Settlement, upon the Court's approval, Defendant shall deliver to Plaintiff's Class Counsel a check in the amount of One-Hundred and Fifty Thousand Dollars and No Cents (\$150,000.00) for the Fee and Expense Award. There will be no further application to any court by Plaintiff or by Plaintiff's Class Counsel for any additional attorneys' fees, costs and/or disbursements. Defendant agrees not to oppose this fee and/or to take any position as to the fairness of the fee.

3.7 Named Plaintiff Award and Release. Within thirty (30) calendar days of the Effective Date of Settlement, Defendant shall deliver to Plaintiff's Class Counsel a check in the amount of Ten Thousand Dollars and No Cents (\$10,000.00) payable to Eugene Lumley, which shall represent the Named Plaintiff Award. The Named Plaintiff Award is paid in exchange for a release by Plaintiff of all Released Parties for all claims, demands, rights, liabilities, and causes of action, including without limitation the Released Claims and Unknown Claims, whether for economic damages, noneconomic damages, punitive damages, restitution, tort, contract, penalties, injunctive or declaratory relief, attorneys fees, costs, or other monies or remedies arising out of, relating to, or in connection with any facts, transactions, events, policies, occurrences, acts, disclosures, statements, omissions or failures to act, which are or could be the basis of any claim that Defendant acted in any manner that was unlawful. This release includes all federal and state statutory claims, and federal and state common law claims (including but not limited to those for contract, tort, and equity), including, without limitation, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 42 U.S.C. §1981, 42 U.S.C. § 1983, the Fair Labor Standards Act, the Family and Medical Leave Act, the Employee Retirement Security Income Act of 1974, the New York Human Rights Law, the New York City Human Rights Law, the New York Labor Law (all as amended), and claims for additional compensation relating to stock options. This release by the Plaintiff shall be effective upon the Effective Date. The Plaintiff may receive a Settlement Payment in addition to any Named Plaintiff Award.

3.8 Settlement Notice. As provided in greater detail in Paragraph 4.5, below, within fifteen (15) business days of receipt of the list of Class Members with last known addresses from Defendant's Counsel following entry of the Preliminary Order Approving Settlement, the Settlement Administrator shall cause to be duplicated and mailed to Class Members the Settlement Notice and shall provide to Plaintiff's Class Counsel proof of such mailing. The Settlement Notice will be sent to the Class Members as their addresses appear on the list(s) to be provided by Defendant within fifteen (15) business days of entry of the Preliminary Order. The costs attendant thereto shall be the responsibility of the Settlement Administrator.

3.9 Termination of Agreement. This Agreement may be terminated by any party if the Court declines to approve the Agreement or any material term of the Agreement, including the Fee and Expense award of One Hundred and Fifty Thousand Dollars and No Cents (\$150,000.00). If the Agreement is terminated for any reason, the Parties agree that the statute of limitations applicable to potential opt-in FLSA plaintiffs will be tolled for the period from the signing of the agreement by the plaintiff until the date one month after the date of the termination. In the event that this Agreement is validly and properly voided, terminated or canceled, or fails to become effective for any reason whatsoever, then the undersigned Parties shall be deemed to have reverted to their respective statuses as of the date and time immediately prior to the execution of this Agreement (except for the statute of limitations agreement above), and they shall proceed to the extent practicable as if this Agreement, its exhibits and any related agreements or orders had never been executed. In such event, any interim class certification

shall be null and void *ab initio* and Class Counsel shall return all data and documents provided by Defendant or its counsel.

ARTICLE 4
CLAIM ADMINISTRATION AND COURT APPROVAL

This Agreement, its administration and Court approval shall be effectuated as follows:

4.1 Preliminary Approval. Counsel for the Parties shall jointly request a hearing before the Court to seek Preliminary Approval of the Settlement on the earliest practical date. In conjunction with such hearing, the Parties will submit this Stipulation, together with the exhibits attached hereto, and any other documents necessary to implement the Settlement. Plaintiff's Class Counsel shall submit the preliminary approval papers to Defendant's Counsel for their review no less than seven (7) business days prior to the date on which the Parties intend to file such papers with the Court. Further, such preliminary approval papers shall be filed jointly, on behalf of both Plaintiff and Defendant, but neither Party shall file such papers until such time as the other Party has given their written approval of such papers and written confirmation that they may be filed with the Court. Simultaneous with the filing of the Stipulation and solely for purposes of this Settlement, Counsel for the Parties shall request that the Court enter the Preliminary Order Approving Settlement.

4.2 Final Court Approval. The Parties jointly shall seek final approval from the Court at the Settlement Hearing. If the Court approves the settlement set forth in this Agreement at the Settlement Hearing or thereafter, the Parties will request that the Court enter

the Order of Final Judgment. The Court will not enter the Order of Final Judgment sooner than one hundred fifty (150) calendar days after the date the Parties file this proposed Settlement Agreement. If the Court refuses to enter the Order of Final Judgment substantially in the form attached hereto, or in such other form as deemed acceptable by all Parties, this Agreement shall be terminated, and the will be relieved of any and all further obligations to comply with this Agreement.

4.3 Administration.

4.3.1 Mr. Rand, in his role as Settlement Administrator, shall be responsible for: (a) printing and mailing the Settlement Notice; (b) disseminating the Settlement Notice; (c) receiving and reviewing the Opt Out Submissions submitted by Class Members; (d) providing to Defendant's Counsel confirmation of the mailing of the Settlement Notice and dissemination of the Settlement Notice, within five (5) business days of such mailing and dissemination; (e) providing to Defendant's Counsel confirmation of the receipt of all executed and/or returned Settlement Notices within five (5) business days of Mr. Rand's receipt of such forms; and (f) keeping track of Opt Out Submissions.

4.4 Calculation of Settlement Payments.

4.4.1 The Parties agree that, for purposes of this Settlement, 60% of each Settlement Class Member's Settlement Payment shall be deemed wages for which payroll deductions will be made from such Settlement Class Member's Settlement Payment for state and federal withholding taxes and any other applicable payroll deductions. The Parties further agree that 25% of each such Settlement Payment represents the payment of interest and 15% represents

the payment of liquidated damages and/or penalties under applicable state law. State and federal taxes and any other applicable payroll deductions shall also be withheld from interest payments. However, penalties paid under this Stipulation shall not be subject to federal, state and local payroll withholding taxes. The Parties agree that the Named Plaintiff Award will be subject to state and federal taxes and other applicable payroll deductions.

4.4.2 Each Eligible Class Member will be responsible for paying all applicable state, local, and federal income taxes on all amounts the Eligible Class Member receives pursuant to this Stipulation. Each Eligible Class Member shall cooperate with Defendant and provide documentation as requested to demonstrate such payment, should any taxing authority challenge the allocation of Settlement Payments.

4.4.3 Defendant shall withhold from Settlement Payments payable to Eligible Class Members all applicable federal, state and local income and employment taxes. Payments to Eligible Class Members and to Plaintiff's Class Counsel pursuant to this Stipulation shall be reported on IRS Forms W-2 and/or 1099, and provided to the respective Eligible Class Members, Plaintiff's Class Counsel and applicable governmental authorities as required by law. Each Eligible Class Member's share of all applicable federal, state and local income and employment taxes withheld and deposited with the applicable governmental authorities in accordance with this Stipulation shall be a part of, and paid out of, the Settlement Payment to each Eligible Class Member.

4.5 Notice Procedure.

4.5.1 Within fifteen (15) business days of the entry of the Preliminary Order Approving Settlement, Defendant's Counsel shall deliver to Plaintiff's Class Counsel a list of the names and last known addresses of all Class Members. This information shall remain confidential and shall not be disclosed to anyone or used for any purpose other than as set forth herein, including, but not limited to Plaintiff's Class Counsel and except applicable taxing authorities or pursuant to express written authorization by the Defendant or by order of the Court. Further, Mr. Rand hereby agrees that this information regarding the class is only being provided for the purposes of administering the Settlement and if final approval of the Settlement by the Court is not obtained, Mr. Rand shall return all such information to Defendant's Counsel within five (5) business days of denial of final approval of the Settlement by the Court. Nor, under such circumstances, shall Mr. Rand use such information for any purpose.

4.5.2 Within fifteen (15) business days after receipt of this information regarding the class described in paragraph 4.5.1 above, Mr. Rand, in his capacity as Settlement Administrator, shall send a copy of the Settlement Notice in the form approved by the Court in its Preliminary Approval Order to all persons shown by Defendant's records to be Class Members (as listed on Exhibit E), via First Class regular U.S. mail, using the most current mailing address from Defendant's records (the address provided by Plaintiff to Mr. Rand shall be used for Plaintiff) or any more current address discovered from the address searches described below in paragraph 4.5.3. The Settlement Notice shall state the calculated Settlement Payment that Class Member is expected to receive if he or she becomes an Eligible Class Member. The Settlement Notice shall include instructions on how to opt-out of the Class, and shall notify Class